NOS. 82-662 and 82-703

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MIDDLESEX COUNTY UTILITIES AUTHORITY
(formerly Middlesex County Sewerage Authority),

Petitioner,

v.

CITY OF NEW BRUNSWICK, BOROUGH OF MILLTOWN and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

and

BOROUGH OF MILLTOWN,

Petitioner,

v.

CITY OF NEW BRUNSWICK and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

BRIEF OF RESPONDENT, CITY OF NEW BRUNSWICK, IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the user charge system prerequisite for federal sewer construction grants to public sewerage agencies under the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1284(b)(1), authorizes the United States Environmental Protection Agency to withhold federal grant funds to a regional public sewerage agency because a municipality whose sewage waste is treated by the regional agency has failed to adopt a system under which the individual contributors to the municipal sewage flow pay proportionate operation and maintenance costs of the regional sewerage agency?

2. Whether the United States Environmental Protection Agency abused its statutory discretion in deciding to withhold federal sewer construction grant funds from a regional public sewerage agency that receives and treats waste from a municipality that has not established a user charge system?

3. Whether 33 U.S.C. §1284(b)(1) unconstitutionally impairs a contract between the City of New Brunswick and the Borough of Milltown pursuant to which New Brunswick has to date disposed of Milltown's sewage for no monetary charge?

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Opinions Below

The opinion of the Court of Appeals, Third Circuit, is reported at 686 F.2d 120 (1982) and is set forth at pages 1a-29a of the appendix to the petition for certiorari filed by the Borough of Milltown (Milltown). The opinion of the District Court, New Jersey, is reported at 519 F.Supp. 878 (1981) and is set forth at pages 33a-52a of the appendix to the Milltown petition. The judgments of the Court of Appeals and the District Court are set forth at pages 30a-32a and pages 53a-56a of the Milltown appendix, respectively.

Jurisdiction

The City of New Brunswick refers the Court to the jurisdictional statement set forth at page two of the petition for certiorari filed by the Middlesex County Utilities Authority (MCUA).

Statutes and Regulations

The statute at issue to this matter is 33 U.S.C. §1284(b). The statute is set forth at pages 2-4 of the MCUA petition. The petitions for certiorari also are directed toward several regulations of the United States Environmental Protection Agency (EPA). These regulations are identified and set forth in the MCUA petition and the appendix thereto.

Statement of the Case

In August 1980, respondent, the City of New Brunswick (New Brunswick), instituted suit against Milltown

and MCUA in the Superior Court of New Jersey. The action focused upon a 1914 contract between New Brunswick and Milltown which obligates New Brunswick to receive and dispose of Milltown sewage. Alleging that federal water pollution law required that Milltown pay a share of the cost of operating and maintaining the MCUA treatment system, New Brunswick sought a mandatory injunction compelling such relief. In addition, New Brunswick further alleged that drastic changes in water pollution control law and other material changes in circumstances rendered the 1914 contract void.[1] On that ground, New Brunswick sought declaratory relief. In November 1980, MCUA brought EPA into the state court litigation as a third-party defendant. EPA then removed the action to the federal courts.

MCUA's third-party complaint against EPA was based upon EPA's partial withholding of water pollution control grant funds from MCUA. Relying upon 33 U.S.C. §1284(b) and 40 C.F.R. §35.935-13(a)(1), EPA refused to completely fund a construction grant to MCUA unless Milltown, a municipality within the MCUA district,[2] adopted a user charge system. MCUA and Milltown have twice unsuccessfully argued that this EPA determination

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[1] The 1914 contract has been twice held valid by the New Jersey courts. *New Brunswick* v. *Milltown*, 135 N.J.Eq. 310, 38 A.2d 288 (Ch. 1944); *New Brunswick* v. *Milltown*, 3 N.J.Super. 113, 65 A.2d 621 (App. Div. 1949). As a result of the decisions below which remand part of the removed action back to state court, a New Jersey court will again decide this issue within a matter of months.

[2] MCUA has stressed in its petition that Milltown is not a participant in the MCUA. However, it is not disputed that Milltown is located in the MCUA district area and never exercised its statutory right to be excluded from this district. *See*, N.J.S.A. 40:14A-4(g) (West 1982).

is inconsistent with the language and purpose of 33 U.S.C. §1284(b). Milltown has also twice unsuccessfully argued that EPA application of 33 U.S.C. §1284(b) unconstitutionally impairs Milltown's 1914 contract with New Brunswick.[3] It is within this factual setting that both MCUA and Milltown have petitioned for a writ of certiorari.

Summary of Argument

Respondent, New Brunswick, argues that the petitions for certiorari that have been filed by MCUA and by Milltown should be denied because the decision below gave full consideration to all issues and decided these issues correctly. In addition, New Brunswick asserts that both petitioners fail to identify any of the special and important considerations necessary for the granting of the discretionary writ of certiorari.

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[3] Having initially argued this position before the District Court, MCUA abandoned this argument on appeal to the Court of Appeals. *See, City of New Brunswick* v. *Borough of Milltown*, 686 F.2d 120, 133 (3d Cir. 1982) (footnote 21) (Milltown Appendix A, p. 25a).

ARGUMENT

POINT I

Petitioners have failed to identify any important issue of federal law which has not been, but should be, settled by this Court.

In separate petitions for certiorari that have been filed with this Court, MCUA and Milltown argue that the decision below raises substantial issues of federal law that should be settled by the Court. Insofar as judicial review of 33 U.S.C. §1284(b)(1) is concerned, petitioners are correct in that the Supreme Court has not yet issued an opinion that construes this statute. Petitioners fail to recognize, however, that the issues raised in the decision below are common to judicial review of any federal statute and not just 33 U.S.C. §1284(b)(1). As a result, these "novel" issues of federal law are, in actuality, questions that have been long since addressed by this Court.

A.

The Court of Appeals properly deferred to the interpretation given to 33 U.S.C. §1284(b)(1) by the agency charged with the administration of the statute, the Environmental Protection Agency.

In the decision below, the Court of Appeals recognized that the issue before the Court centered upon interpretation of a statute by an administrative agency, EPA. Writing for the Third Circuit, Circuit Judge Garth acknowledged the well-established principle that a reviewing court should show great deference to agency interpretation of a

statute.[4] As recognized by this Court in reviewing yet another section[5] of the Clean Water Act,[6]

> It is now a commonplace that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16, 13 L.Ed. 2d 616, 85 S.Ct. 792 (1965).

EPA v. *National Crushed Stone Assn.*, 449 U.S. 64, 83, 66 L.Ed.2d 268, 101 S.Ct. 295 (1980).

In the petitions at bar, MCUA and Milltown argue that 33 U.S.C. §1284(b)(1) has been improperly construed by EPA. Notwithstanding the expertise of EPA in interpreting environmental legislation,[7] petitioners argue that the agency interpretation is unreasonable when measured against the language and purpose of the statute. Petitioners are wrong. The EPA interpretation is consistent with the statute's language and legislative history.[8] The EPA interpretation is therefore reasonable and does not present any of the special considerations necessary for the granting of the discretionary writ of certiorari.

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[4] *City of New Brunswick* v. *Borough of Milltown*, 686 F.2d 120, 127 (3d Cir. 1982).

[5] 33 U.S.C. §1314.

[6] 33 U.S.C. §§1251 *et seq.*

[7] *See, Chrysler Corp.* v. *EPA*, 631 F.2d 865, 884 (D.C.Cir. 1980), *cert. denied* 449 U.S. 1021 (1980).

[8] *See* Point I, B of this Argument.

B.

The determination of the Court of Appeals that the action of EPA does not contravene 33 U.S.C. §1284(b)(1) is totally consistent with the plain meaning and the legislative history of the statute.

The plain language of 33 U.S.C. §1284(b)(1) directs the Administrator of EPA not to release sewage treatment grant funds—

> . . . unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that *each recipient* of waste services *within the applicant's jurisdiction, as determined by the Administrator,* will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant . . . (emphasis added).

Neither the statute nor the act within which the statute is included defines the words "recipient" or "jurisdiction". The statute does, however, direct EPA to determine if a particular municipality or industry fits within the meaning of these terms.

In the case at bar, EPA interpreted 33 U.S.C. §1284 (b)(1) to require Milltown, a municipality within the MCUA district area, to adopt a user charge system in order that the MCUA receive sewage grant funding. The EPA interpretation was based upon findings that Milltown waste is processed in the MCUA plant and that Milltown is located within the MCUA service territory. These findings are not disputed by petitioners. The Court of Appeals and the District Court found that the EPA interpretation was reasonable. In view of this determination of reasonable

statutory interpretation by EPA, the petitions pending before this Court for a writ of certiorari present no important new issue of federal law and should be denied.

Notwithstanding the plain meaning of 33 U.S.C. §1284 (b)(1), petitioners also argue that EPA interpretation conflicts with the purposes underlying federal water pollution control legislation. As a result of this "conflict", petitioners assert that EPA does not have the authority tc withhold federal grant funds or has abused its discretion in withholding funds under the facts of this case. Petitioner's argument fails as it ignores the purposes specific to the user charge requirement.

As determined by the Court of Appeals in the decision below, Congress sought to promote water conservation through the user charge requirement of 33 U.S.C. §1284.

> [I]t is clear that one of the purposes of section 204's [33 U.S.C. §1284] user charge requirement is to promote water conservation. *See* S. Rep. No. 217, 95th Cong. 2d Sess. 27, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326, 4352 ("A charge to the 'consumer' based on cost of treatment would be a positive force in encouraging more efficient management of wastes discharged through a municipal system as well as an economic inducement to reduce excessive use."). Although Congress in 1977 amended the Clean Water Act to allow charges to be based on ad valorem taxes or flat fees in certain cases rather than on direct measures of sewage flows such as metering, *see* 33 U.S.C. [1284(b)(4) (Supp. 1982), we cannot agree with appellants that in so doing Congress "eviscerated" any conservation purpose to the user charge requirement. On the contrary, conservation of water is heavily stressed in the legislative history to the 1977 amendments to the Clean Water Act. *See, e.g.,*

> 1977 U.S. Code Cong. & Ad. News at 4351. In our view, the 1977 amendments were intended simply to provide "greater flexibility . . . for the assessment of user charges," *id.* at 4352, and not to undermine the user charge concept itself of its underlying purposes (footnotes omitted).

City of New Brunswick v. *Borough of Milltown*, 686 F.2d 120, 133 (3d Cir. 1982). Absent a user charge system applicable to contributors to the Milltown sewage flow, the legislative purpose of water conservation is frustrated. Milltown residents would instead have every incentive to waste a natural resource—water. EPA's interpretation of 33 U.S.C. §1284(b) is therefore totally consistent with the purpose of the statute and should not form the basis for the granting of certiorari.

POINT II

There is no conflict among the federal courts of appeals as to the legislative purposes of 33 U.S.C. §1284(b)(1).

Petitioners have argued that the decision of the Court of Appeals, Third Circuit, below conflicts with a decision of the Court of Appeals, Ninth Circuit,[9] as to the legislative purposes of 33 U.S.C. §1284(b). New Brunswick strongly disagrees with petitioner's reading of *Hotel Emp. Ass'n* and asserts that the circuit courts do not conflict as to the purposes of 33 U.S.C. §1284(b).

In the decision below, the Third Circuit determined that Congress intended that EPA be flexible in the design of

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[9] *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F.2d 1305 (9th Cir. 1982).

user charge systems.[10] The Third Circuit, however, also recognized that Congress intended that user charges promote water conservation and to ensure that each federally assisted waste disposal plant is economically self-sufficient in its operations.[11] Each of these policy considerations was important to the Third Circuit decision as the questions pending before the Court focused upon the very existence of a user charge system as opposed to the administration of an existing user charge system.

In contrast, the decision of the Ninth Circuit in *Hotel Emp. Ass'n* involved the administration of an existing user charge system. The Ninth Circuit was asked to decide how much each user should pay and not whether a specific municipal discharger should be excused from participation in the user charge system. As such, it is not surprising that the Ninth Circuit decision stresses the legislative purpose most relevant to administration—flexibility. The Ninth Circuit did not purport to set forth an exclusive listing of the purposes and policies underlying 33 U.S.C. §1284(b). The decision of the Third Circuit below merely supplements the analysis of the Ninth Circuit in *Hotel Emp. Ass'n*. Petitioners allegations of conflict among the circuit courts is not supported by the cited authorities.

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[10] *City of New Brunswick* v. *Borough of Milltown*, 686 F.2d 120, 132 (3d Cir. 1982).

[11] Id. at 133.

POINT III

Milltown has conceded that the issue of contract impairment does not support granting of a writ of certiorari.

In its petition for certiorari, Milltown has admitted that the Third Circuit decision does not create an issue of impairment of contract that would support granting of certiorari. New Brunswick has merely reframed this question in the event that jurisdiction is accepted by the Court.

CONCLUSION

It is submitted that the Court should deny issuance of its writ to review the decision of the Court of Appeals because petitioners have failed to identify any of the special and important reasons necessary for acceptance of jurisdiction. The decision below is founded upon long-standing decisions of this Court and presents no novel issue of federal law. The decision below does not conflict with the holding of any other Circuit Court of Appeals. The petitions of MCUA and Milltown should therefore be denied.

Respectfully submitted,

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